

530

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODYName Raul A Garibay

(Last)

Raul

(First)

Prisoner Number P 98953Institutional Address Huinal, P.O. Box 8103, Santa Clara, California
CA 95003-8103RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
(Initials)

2007

CW

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

C 07 5338

Raul A Garibay

Full Name of Petitioner

Case No.

(To be supplied by the Clerk,
United States District Court)

vs.

John Marshall-WardenName of Respondent
(Warden or jailor)

PETITION FOR A WRIT OF HABEAS CORPUS

Read Comments Carefully Before Filling InWhen and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

Who to Name as Respondent

You must name the person in whose actual custody you are. This usually means the Warden or jailor. Do not name the State of California, a city, a county or the superior court of the county in which you are imprisoned or by whom you were convicted and sentenced. These are not proper respondents.

If you are not presently in custody pursuant to the state judgment against which you seek relief but may be subject to such custody in the future (e.g., detainers), you must name the person in whose custody you are now and the Attorney General of the state in which the judgment you seek to attack was entered.

A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

1. What sentence are you challenging in this petition?

(a) Name and location of court that imposed sentence (for example; Alameda County Superior Court, Oakland):

Superior Court of Santa Clara County 191 N. First St.,
Court San Jose, CA 95113-1090 Location

(b) Case number, if known No's CC060531, H022283

(c) Date and terms of sentence November 3, 2000; 16 years

(d) Are you now in custody serving this term? (Custody means being in jail, on parole or probation, etc.) Yes No

Where? California Men's Colony-West Highway 1, P.O. Box 8103
 (Name of Institution) San Luis Obispo, CA 93403-8103 (Address)

2. For what crime were you given this sentence? (If your petition challenges a sentence for more than one crime, list each crime separately using Penal Code numbers if known. If you are challenging more than one sentence, you should file a different petition for each sentence.)

§§ 261(3)(2), 273.5(2), 286(c)(2), 245(2)(1), 236-237, 417(2)(1)
Am challenging Upper Term enhancement, on count 6, §§
236, 237

3. Did you have any of the following?

Arraignment: Yes No Preliminary Hearing: Yes No

Motion to Suppress: Yes No

4. How did you plead?

Guilty Not Guilty Nolo Contendere

Any other plea (specify) Not

5. If you went to trial, what kind of trial did you have?

Jury Judge alone Judge alone on a transcript

6. Did you testify at your trial? Yes No

7. Did you have an attorney at the following proceedings:

(a) Arraignment Yes No
 (b) Preliminary hearing Yes No
 (c) Time of plea Yes No
 (d) Trial Yes No
 (e) Sentencing Yes No
 (f) Appeal Yes No
 (g) Other post-conviction proceeding Yes No

8. Did you appeal your conviction? Yes No

(a) If you did, to what court(s) did you appeal?

Court of Appeal Yes No 2002 affirmed
 (Year) (Result)

Supreme Court of California Yes No 2002 denied
 (Year) (Result)

Any other court Yes No 2003 pending C.O.A.
 (Year) (Result)

(b) If you appealed, were the grounds the same as those that you are raising in this petition? Yes No

(c) Was there an opinion? Yes No

(d) Did you seek permission to file a late appeal under Rule 31(a)? Yes No

If you did, give the name of the court and the result:

9. Other than appeals, have you previously filed any petitions, applications or motions with respect to this conviction in any court, state or federal? Yes No

Note: If you previously filed a petition for a writ of habeas corpus in federal court that challenged the same conviction you are challenging now and if that petition was denied or dismissed with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider this petition. You may not file a second or subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28 U.S.C. § 2244(b).

(a) If you sought relief in any proceeding other than an appeal, answer the following questions for each proceeding. Attach extra paper if you need more space.

I. Name of Court Superior Court of Santa Clara

Type of Proceeding habeas corpus proceeding

Grounds raised (Be brief but specific):

- a. illegal enhancement / trial court Judge lacked authority to Sentence in the Upper Term
- b.
- c.
- d.

Result denied Date of Result March 15, 2007

II. Name of Court Sixth Appellate District, Court of Appeal

Type of Proceeding habeas corpus proceeding

Grounds raised (Be brief but specific):

- a. same as Superior Court
- b.
- c.
- d.

Result denied Date of Result, ?

III. Name of Court Supreme Court of California

Type of Proceeding Petition for Review

Grounds raised (Be brief but specific):

- a. Cunningham issue

b. na

c. na

d. na

Result denied

Date of Result July 11, 2007

(b) Is any petition, appeal or other post-conviction proceeding now pending in any court? Yes No

Ninth Circuit Court, Docket No. 03-1808, March 19, 2007
(Name and location of Court)

B. GROUNDS FOR RELIEF

State briefly every reason that you believe you are being confined unlawfully. Give facts to support each claim. For example, what legal right or privilege were you denied? What happened? Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you need more space. Answer the same questions for each claim.

Note: You must present ALL your claims in your first federal habeas petition. Subsequent petitions may be dismissed without review on the merits. 28 U.S.C. § 2244(b); McCleskey v. Zant, 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).

Claim One: Upper Term enhancement on Count 6 (§§ 236, 237) is [un]constitutional.

Supporting Facts: petitioner's Jury did NOT find true aggravating factors on count 6; petitioner is being punished pursuant to his other offenses, relevant to §§ 236, 237, and those offenses, which is impermissible fact finding.

Claim Two: na

Supporting Facts: na

na

na

na

Claim One: Supporting facts (con't.)

Each count MUST stand on it's own merit, be proven beyond a reasonable doubt, acts and omissions arising out of their operative facts. This occurring instant case falls squarely under Blakely vs. Washington, 542 U.S. [125 S.Ct. at p. 2537, quoting 1 Bishop, Crim. Proc. (2d ed. 1872) § 87, p. 55] when a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment"]; instant case Judge did NOT strike the other crimes pursuant to Rule 4420(c), to warrant Upper Term punishment. Rule 4.441 would naturally preclude dual use of any fact. The statutory maximum, as to count 6, was "midterm"; Blakely defined the "statutory maximum" to be "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict...". Id., at 303. California Supreme Court and Lower Court's denial on this Claim is [un]reasonable application of Cunningham vs. California, 549 U.S. [127 S. Ct. 856]: Cunningham determined D.S.L. since 1977 was [un]Constitutional, did NOT meet Standard of proof required (In re Winship, 397 U.S. 358, 20 S. Ct. 1068, 25 L.Ed. 2d 368 (1970)) Sixth Amend. Trial Trials. California continues to disagree (Black II, 5126182) however, the United States Supreme Court is Supremacy Doctrine (127 S. Ct. 856, 863-864) This Court has repeatedly held that, under Sixth Amendment, any fact that exposes a defendant to a

Claim One: Supporting facts (con't.)

greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence. See, City of Auburn vs. Quest Corp., 260 F.3d 1160 (9th Cir. 2001) (under Supremacy Clause, state courts are obligated to apply and adjudicate federal claims fairly presented to them.) which, petitioner DID. Here, the Federal Issue is application of [un] Constitutional Statute to punish. See, Jones vs. United States, 526 U.S. [119 S.Ct. 1215] at 252-253 "[I]t is unconstitutional for a legislature to remove from jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." Id., at 243, n.6, "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt." "The Fourteenth Amendment commands the same answer in this case involving a state statute." California Legislature (1977) lacked Jurisdiction to empower trial court Judge to Sentence petitioner, et alia, to upper Term, without Jury Verdict. (sic)

Claim Three: na

Supporting Facts: na

na

na

na

If any of these grounds was not previously presented to any other court, state briefly which grounds were not presented and why:

na

na

na

na

List, by name and citation only, any cases that you think are close factually to yours so that they are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning of these cases:

Blakely vs. Washington

In re Winship

Cunningham vs. California

City of Auburn vs. Quest Corp.

Tones vs. United States

Do you have an attorney for this petition? Yes No x
If you do, give the name and address of your attorney:

WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

Executed on October 2, 2007.
Date

R. L. G. Galy
Signature of Petitioner

Exhibits

Court of Appeal, Sixth Appellate District - No. H031459
S153137

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re RAUL A. GARIBAY on Habeas Corpus

The petition for review is denied.

**SUPREME COURT
FILED**

JUL 11 2007

Frederick K. Ohlrich Clerk

Deputy

GEORGE

Chief Justice

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA. } NO. _____
Plaintiff and Respondent. } (Lower Court No. 5
vs } H031457, CC060531)
RAUL A. GARIBAY,
Defendant and Appellant.)

PETITION FOR REVIEW

After Decision By The Court Of Appeal
Sixth Appellate District
Filed May 11, 2007

Ex Propria Personae

RAUL A. GARIBAY
P-98953
P.O. Box 8103
111433 W
California Men's Colony
West
San Luis Obispo
Highway 1
California
93403-8103

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,) NO. _____
Plaintiff and Respondent,) (Court of Appeal
IS.) Case No. H03L457;
RAUL A. GARIABY,) Superior Court
Defendant and Appellant.) Case No. CC060531)

TO: THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE,
AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE STATE OF CALIFORNIA:

PLEASE TAKE NOTICE: that Appellant prays for this Court to review the decision of the Court of Appeal, Sixth Appellate District, filed in that on May 11, 2007, and received by appellant on May 15, 2007. A copy of the opinion of the Court of Appeal and the original petition's argument, points and authority are attached, and hereto included as Exhibit A, of this Petition For Review.

Question Presented

Since the United States Supreme Court ruled Indeterminate Sentencing Law [un] Constitutional (re Penal Code § 1170 (6) placing sentencinglevating fact finding within the judge's province, violates a defendant's right to trial by jury

separation of the sixteenth and fourteenth Amendments) is not [a] very Defendant's Sentence unConstitutional since July 1, 1977, (the effective and operative Date of D. S. L.) where a trial court judge aggravated a Sentence by a preponderance of the evidence?

Necessity For Review

A grant of review and resolution of this issue by this Court is necessary to secure uniformity of decision and to settle an important question of law, pursuant to rule 29(a)(1), California Rules of Court. The importance of this issue is to establish the precedence (point-in-time) of U.S. Supreme Court decision, *Tate Cunningham vs. California*, 549 U.S. [127 S.Ct. 856, 166 L.Ed.2d 856], its application on *nibers corpus petition*.

The need for uniformity of decision is pointed-up because of the obvious Constitutional infirmity of the Penal Code Statute since it's operative and effective Date, and discriminating effect (if only applied retroactively on direct appeal.)

Further, this case provides this Court with opportunity to settle Jurisdictional Issues, "separation of powers doctrine" on points of law; peculiarly, application

of beyond a reasonable doubt Standard in Penal Legislation ~~is~~ by a preponderance of the evidence; when either is mandatory or permissible.

Finally, the importance of this Issue is pointed-up because [any] change in the Law by California's Legislature, now, puts to question the Constitutionality of Sentences, since July 1, 1977, that were elevated by a preponderance of the evidence, seriously affecting the fairness, integrity, and public reputation of judicial proceedings of ~~ALL~~ DEFENDANT(S). As the United States Supreme Court wrote in Cunningham, supra, "The bail ... lies in [California's] court."

Argument

Under California Constitution, Article I, §§ 7 and 15, is provision that a person may not be deprived of life, liberty, or property, without due process of law; although due process encompasses a broad range of safeguards, in essence the concept guarantees a fundamentally fair decision making process. People v. Remos (1984) 37 Cal.3rd. 136, 207 Cal. Rptr. 800, 689 P.2d 430. The Cunningham Interdict is just that, Penal Code § 1170, subd. (b). "process" violates an defendant's Sixth and Fourteenth Amendments. Due process guarantees. Under Martin v. Hunter's Lessee,

19 U.S. 304 (1816) which, affirmed the Supreme Court's right to appellate jurisdiction - that is the right to review all state court judgments in cases arising under the federal Constitution or a law of the U.S.. Due Process Guarantee's must prevail. Winship beyond a reasonable doubt prong of due process in criminal trial process was the standard NOT by a preponderance of the evidence that Penal Code § 1170(b) (in pertinent part) allowed. The separation of powers doctrine exists with the Constitution as ruling Authority just so Esprit de corps in any Branch does NOT occur; dissenting over time gives occasion to that which occurred in drafting Penal Code § 1170(b). Sixth Amendment trials always have been "pleadings and proof of indictment." United States vs. Reese, 92 U.S. 214, 232-233, 23 L.ED 563 (1875) "If the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted." I J Bishop, Crim. Law §§ 933-948 (7th ed. 1923) exactly the same holding "If the law has given the court a discretion as to the punishment... to influence a judicious magistrate to make it heavier or lighter, yet not to exceed the limits fixed for what of crime is within the allegation and the verdict." More recent, "If the relevant 'statutory maximum'... is not the maximum sentence a judge may impose after finding additional

facts, but the maximum he may impose without such additional findings." Blakely v. Washington, 542 U.S. 296 (2004) at 303-304, to which Cunningham relied upon. Always the law [was/is] confinement to that which is in accusation and verdict. Any other pleadings "outside" the verdict, such as Penal Code § 1170(s) (degrees in aggravation by a preponderance of the evidence) violates even Sixth Amendment right of confrontation: "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him. We have held that this bedrock procedural guarantee applies to both federal and state prosecutions. Crawford v. Washington, 124 S.Ct. 1354, 1357. Admitting "statements" deemed reliable by a judge is fundamentally at odds with right of confrontation. *Id.* at 1371. "Penal Code § 1170(b) allows judge to make determination without right of confrontation and by a lesser burden of proof. The statute falls on 2-points of law. in place long before any of the additional facts Cases. (Winship and Bishop) U.S.C.S. Sixth and Fourteenth Amendments. 18 Bishop § 948... "the aggravating factor must not be of a crime separate from the one charged in the indictment." California legislature in drafting Penal Code § 1170(b) and implementing Rules of Court, has made offender's status elements of

offense. The Court put this discussion to rest in *Apprendi v. New Jersey*, 120 S.Ct. 2348, 2359, fn. 10, "The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense." *Id.* fn. 9 ("Nothing in Williams implies that a judge may impose a more severe sentence than the maximum authorized by the facts found by the jury" *Lynch, Towards a Model Penal Code, Second (Federal?) 2 Buff. Crim. Law Rev.* 277, 320 (1978) (noting that judges in discretionary sentencing took account of facts relevant to a particular offense "within the spectrum of conduct covered by the statute of conviction"). The sum of this argument is not the application of Cunningham here retroactive, but the ONLY term of punishment in Black Code § 1170 that meets the beyond a reasonable doubt standard set forth in *In re Winship*, *supra*, 397 U.S. 352, 362-64, is "mid-term" and, that fact/law being true, Pen. Code § 1170(b) degree of mallegation or aggravation is illegal[.] *Carter*, [§ 1170] Cunningham ameliorates; however, it does not break new ground as some would like to think because as *Carter* esp-

ment would prove beyond any doubt Penal Code § 1170(6), degrees of aggravation found to be true by a preponderance of the evidence was manifestational in its affective state. NOT even a Jury could find degrees of aggravation (or mitigation) by a preponderance of the evidence. In re Winship, *supra*, 397 U.S. 353, [390 U.S. at 1068, 25 L.ED.2d 368] at pp. 362-64 (1971) (The reasonable doubt standard applies in both state and federal proceedings.) California's Legislature had NO jurisdiction (or authority) to lessen burden of proof in criminal statute. Since Winship, the United States Supreme Court made clear in a venture that Winship the process and associated jury instruction extend to the length of sentence. *Blomdalen v. Tennes*, 523 U.S. at 251, 118 S.Ct 1217. The statutory maximum/minimum that does comply with Winship is only "mid-term"; Winship is state decisis in criminal law. On July, 1977, Penal Code § 1170(6), was found unconstitutional (degrees of aggravation or mitigation) NOT because of Cunningham, but because of Winship law process. All Defendants must wait on habeas corpus. Being unconstitutional if not struck. Under habeas corpus § 116, the general rule that an unexpected delay in seeking relief may bar habeas corpus relief does not apply to bar the correction of an unauthorized

sentence. *In re Birdwell*, 50 Cal. App. 4th 721, 58 Cal. Rptr. 2d 244 (1996) (a writ of habeas corpus will be granted when the petitioner raised issues showing that the Court acted outside its legal authority. Actions taken in excess of the Court's authority may be challenged on habeas corpus even if there has been delay or a prior afforinance or direct appeal.)

Conclusion

The law protects rights under Wainwright, which requires the prosecution to prove every element charged in a criminal trial beyond a reasonable doubt, provides for relief that which Cunningham ameliorates, *not* held unconstitutional. Instead, Penal Code 1170.16(d)(2), is drafted and effective July 1, 1977 *out of* spirit of Wainwright strictures. Cunningham is but a magnification of Wainwright in that it is not Cunningham applied retroactively, but Wainwright prospectively. For the aforementioned reasons applicant respectfully specifically requests that this Court grant Review, just received being "whether or not the statutory maximum (and minimum) sentence determinate sentencing law affected his case is 'moot' because it is mandatory sentencing within the allegation and the verdict." with dictata for the lower courts to follow.

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FILED
MAR 15 2007

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

KIRI TORRE
Chief Executive Officer
Superior Court of CA County of Santa Clara
BY *[Signature]* DEPUTY

In re) No.: CC060531
RAUL A. GARIBAY,)
On Habeas Corpus)
ORDER

Mr. GARIBAY, (hereinafter Petitioner,) has filed a habeas corpus petition in which he seeks relief based on the United States Supreme Court's holding, in *Cunningham v. California* (2007) 127 S.Ct. 856, that *Blakely v. Washington* (2004) 542 U.S. 296 applies to California's sentencing practices. However Petitioner's case was final prior to June 24, 2004, (the date *Blakely* was decided) and the *Blakely* rule is not retroactive. (See *In re Consiglio* (2005) 128 Cal.App.4th 511, *People v. Amons* (2005) 125 Cal.App.4th 855, 864-865, and *Schardt v. Payne* (2005, 9th Circuit) 414 F.3d 1025.) Accordingly, all requested relief or action is denied.

DATED: March 15, 2007

Linda R. Condron
LINDA R. CONDRON
JUDGE OF THE SUPERIOR COURT



cc: Petitioner
District Attorney
Research (2-27A)
CJIC

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

PEOPLE OF THE STATE OF CALIFORNIA)

Plaintiff,)

CASE NO: CC060531

VS.)

Raul A. Garibay,)

Petitioner)

PROOF OF SERVICE BY MAIL OF: ORDER

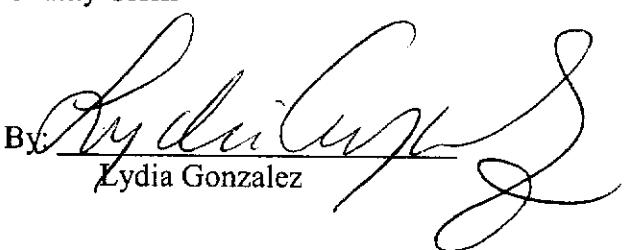
CLERKS CERTIFICATE OF MAILING;

I CERTIFY THAT I AM NOT A PARTY TO THIS CAUSE AND THAT A TRUE COPY OF THIS DOCUMENT WAS MAILED FIRST CLASS POSTAGE PREPAID IN A SEALED ENVELOPE ADDRESSED AS SHOWN BELOW AND THE DOCUMENT WAS MAILED AT SAN JOSE, CALIFORNIA ON March 16, 2007

Dated: March 16, 2007

KIRRI TORRE

County Clerk

By 

Lydia Gonzalez

Raul Garibay CDC # P-98953
Pleasant Valley State Prison
P.O. Box 8503, Fac. C-1, 118U
Coalinga, CA 93210

District Attorney
70 West Hedding Street
San Jose, Ca 95110
(placed in inter-office box)

Research Attorney's/Hall of Justice
190 W. Hedding Street
San Jose, CA 95110
(placed in inter-office box)

CJIC/Hall of Justice
190 W. Hedding Street
San Jose, CA 95110
(placed in inter-office box)

trial court Judge lacked jurisdiction and
statutory authority, to sentence Petitioner
in the Upper Term in Count Six.

on March 15, 2007, Superior Court of Santa Clara
denied Petition For Writ Of Habeas Corpus, stating
the Supreme Court's ruling in *re Cunningham*
(2007) 127 S.Ct. 856 did not apply instant Petition,
citing Blakely rule is not retroactive. Comes, now,
Petitioner on habeas corpus appeal with dis-
claimer on his jumbled Claim, modifying Claim
to just the upper term application on Count Six
(§§ 236-237) that pursuant to Penal Code § 1170.1(a)¹
Jury was "trier of fact" NOT Judge; hence, Petitioner
was denied his Sixth Amendment trial by Jury as of
right. Petitioner contends *Cunningham* is only
ameliorative, that pursuant to Pen. Code § 1170(b)

¹ Pen. Code § 1170.1(e) "All enhancements... found to be
true by the trier of fact" (pertinent part)

Supporting facts: (con't)

not enough Judge lacked Jurisdiction and Statutory Authority (because) petitioner requested Jury Trial and say aggravation found to be true by a preponderance of the evidence was not enough. *Barber Winship Due Process* (1970). All States have been required to prove beyond a reasonable doubt that which distinguishes a more serious crime from a less serious one... a state may not distinguish, without requiring the prosecution to prove beyond a reasonable doubt the facts upon which the distinction turns. Trial court Judge lacked Statutory Authority beyond "mid-term" because California Legislature lacked Jurisdiction/Authority to lessen burden of proof for any fact as to guilt or punishment (Winship, the reasonable doubt standard applies in both state and federal proceedings.) Note even petitioner's ³ may could aggravate Count Six by a preponderance. Petitioner must win because upper term was NOT found to be true beyond a reasonable doubt by Jury. ³ Petitioner contends ONLY part of his sentence is illegal, and request "Amended" Abstract of Judgment (Count Six, "mid term") sent to Warden, California Men's Colony - West, Hwy 1, P.O. Box 8103, San Luis Obispo, CA 93403-8103.

³ *In re Winship*, 397 U.S. 358, 364; see, also, *Jones v. U.S.*, 526 U.S. 227, 143 L.Ed.2d 311, 117 S.Ct. (1999) 1215

supplementary cases, rules, or other authority: ~~is not~~) ("[I]t is unconstitutional for a legislature to remove from jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.")

People vs. Halcón (1988) 44 Cal.3d 713, 758, 244 CR 867 ("Any factor relied upon for aggravation of sentence must be proved beyond a reasonable doubt")

People vs. Price (1986) 184 Cal.3d 1405, 229 CR 550 (only part of a sentence is unauthorized, a sentencing court, following remand or re-arrest may not increase a sentence on all counts);

People vs. Jack (1989) 213 Cal. App. 3d 713, 261 Cal. Rptr. 860 (illegal sentence may be corrected any time); U.S. vs. Conley, 347 F.3d 837 (5th Cir. 2003) (sentence that exceeds statutory maximum is an illegal sentence and therefore constitutes plain error)

(VERIFICATION - 446, 2015.5 C.C.P.)

STATE OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

I am the party of the above entitled actions, a citizen of the United States, over the age of eighteen years and a resident of San Luis Obispo County. My current address is:

Raul Garibay CDC No. P 98953
California Men's Colony-West
P.O. Box 8103 Unit 1 Dorm 4 Bed 334
San Luis Obispo, California 93403-8103

I CERTIFY (OR DECLARE), UNDER THE PENALTY OF PERJURY, THAT THE FOREGOING IS TRUE AND
CORRECT. EXECUTED ON October 2, 2007, AT SAN LUIS OBISPO, CALIFORNIA, 93403-8103

Raul A. Garibay
PETITIONER

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

I AM A RESIDENT OF SAID COUNTY, OVER THE AGE OF EIGHTEEN YEARS, AND NOT A PARTY TO THE ABOVE
ENTITLED ACTION. MY STATE PRISON ADDRESS IS:

Raul Garibay CDC No. P 98953
California Men's Colony-West
P.O. Box 8103 Unit 1 Dorm 4 Bed 334
San Luis Obispo, California 93403-8103

ON October 2, 2007, I SERVED THE WITHIN Petition for Writ of Habeas Corpus
Exhibits

ON THE PARTY: United States Northern District Court of Appeals
Attorney General of California

IN SAID ACTION, BY PLACING A TRUE COPY THEREOF IN A SEALED ENVELOPE WITH POSTAGE THEREON
PREPAID, IN THE UNITED STATES MAIL, AT CALIFORNIA MEN'S COLONY, SAN LUIS OBISPO, CA, 93403-8103,
ADDRESS AS FOLLOWS:

<u>U.S. Courthouse</u>	<u>11</u>	<u>455 Golden Gate Ave.</u>
<u>450 Golden Gate Ave.</u>		<u>Ste. 11000, San Francisco</u>
<u>San Francisco, CA</u>		<u>CA 94102-2009</u>
<u>94102-3483</u>		

I DECLARE, UNDER THE PENALTY OF PERJURY, THAT THE FOREGOING IS TRUE AND CORRECT. EXECUTED
ON October 2, 2007, AT SAN LUIS OBISPO, CALIFORNIA

Raul A. Garibay
SIGNATURE OF DECLARANT